

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL CHIOFAR,)	
)	
Petitioner,)	CASE NO. C07-244-JCC-MJB
)	
v.)	
)	
CAROL SCHAPIRA, <i>et al.</i> ,)	REPORT & RECOMMENDATION
)	
Respondents.)	
_____)		

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Michael Chiofar brings this action under 28 U.S.C. § 2254 to challenge his 2003 King County Superior Court conviction on a charge of intimidating a judge. Respondents have filed an answer to the petition in which they assert that this Court lacks jurisdiction over petitioner's federal habeas petition. Following a careful review of the briefs of the parties, and the balance of the record, this Court concludes that because petitioner is no longer in custody, petitioner's petition should be dismissed, with prejudice, for lack of subject matter jurisdiction.

1 dismissed the petition. (Dkt. No. 15, Ex. 20.) Petitioner filed a motion for discretionary review in the
 2 Washington Supreme Court, but that motion was denied by the Supreme Court Commissioner on May
 3 26, 2006. (*Id.*, Exs. 21 and 22.) Petitioner's subsequent motion to modify the Commissioner's ruling
 4 was also denied. (*Id.*, Exs. 23 and 24.) The Court of Appeals issued a certificate of finality in
 5 petitioner's personal restraint proceedings on August 8, 2006.¹ (*Id.*, Ex. 25.) Petitioner now seeks
 6 federal habeas review of his conviction.
 7

8 GROUND FOR RELIEF

9 Petitioner identifies a single ground for relief in his federal habeas petition:

10 Petitioner's conviction is contrary to the Constitution of the United States
 11 because it violates the First Amendment right to freedom of speech.

12 (*See* Dkt. No. 4 at 5.)

13 DISCUSSION

14 Respondent asserts that this Court lacks subject matter jurisdiction over petitioner's federal
 15 habeas petition because petitioner is no longer "in custody" for purposes of federal habeas review.
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17 The record supports this assertion.

18 Subject matter jurisdiction under 28 U.S.C. § 2254 is limited to those persons "in custody
 19 pursuant to the judgment of a State court." 28 U.S.C. § 2254(a); *Brock v. Weston*, 31 F.3d 887, 889
 20 (9th Cir. 1994). Once a petitioner's sentence has fully expired, he is precluded from challenging that
 21 sentence because he is no longer "in custody" for purposes of federal habeas review. *Maleng v. Cook*,
 22 490 U.S. 488, 492 (1989). The collateral consequences of an expired conviction, while sufficient to
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24 ¹ Respondents indicate in their answer that petitioner at some point had another proceeding in
 25 the Washington Court of Appeals, but that they are unable to provide any information or
 26 documentation with respect to that proceeding because they have been unable to obtain the file from
 the state court.

1 preclude mootness, are not sufficient to satisfy the “in custody” requirement of § 2254. *Feldman v.*
2 *Perrill*, 902 F.2d 1445, 1448 (9th Cir. 1990)(citing *Maleng v. Cook*, 490 U.S. at 492). *See also,*
3 *Carafas v. LaVallee*, 391 U.S. 234 (1968).

4 The “in custody” requirement of § 2254 may be met even if the petitioner is not physically
5 confined. *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993), citing *Jones v.*
6 *Cunningham*, 371 U.S. 236, 239-40 (1963). *See Jones*, 371 U.S. at 240-43 (parole tantamount to
7 custody); *Hensley v. Municipal Court*, 411 U.S. 345, 348-49 (1973)(release on personal recognizance
8 pending appeal satisfies “in custody” requirement); *Dow*, 995 F.2d at 923 (mandatory attendance at
9 alcohol rehabilitation program satisfies in custody requirement); *Barry v. Bergen County Probation*
10 *Department*, 128 F.3d 152 (3rd Cir. 1997)(community service obligation rendered petitioner “in
11 custody” for purposes of habeas statute). However, in order to satisfy the custody requirement, the
12 “petitioner must demonstrate that he is subject to a significant restraint upon his liberty ‘not shared by
13 the public generally’” *Dow*, 995 F.2d at 923, quoting *Jones*, 371 U.S. at 240.

14 The record makes clear that petitioner has served his jail term and has completed his term of
15 community custody. Petitioner identifies in his petition a number of “collateral disabilities” that arise
16 from his conviction. Among the disabilities cited are that petitioner is ineligible to possess a firearm,
17 to vote, or to sit on a jury, and that having a criminal record poses difficulties for petitioner in
18 obtaining, and retaining, rental housing. None of these collateral consequences of petitioner’s
19 conviction are sufficient to render him “in custody” for purposes of federal habeas review.

20 Petitioner also appears to suggest that the provision contained in his judgment and sentence
21 which prohibits him from going to the Regional Justice Center “without counsel or without prior
22 permission on legal business” constitutes some form of custody. However, petitioner provides no
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1 authority to support the proposition that such a restriction constitutes the type of significant restraint
2 necessary to render him “in custody” for purposes of federal habeas review.

3 CONCLUSION

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5 Petitioner fails to demonstrate that he is subject to any form of restraint sufficient to constitute
6 custody for purposes of federal habeas review. Accordingly, this Court recommends that petitioner’s
7 federal habeas petition be denied and that this action be dismissed, with prejudice, for lack of subject
8 matter jurisdiction.² A proposed order accompanies this Report and Recommendation.

9 DATED this 13th day of August, 2007

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12 MONICA J. BENTON
13 United States Magistrate Judge
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23 ² Petitioner presented his federal habeas petition to the Court as a “Petition for Writ of Habeas
24 Corpus, or, in the Alternative, Petition for a Writ of Coram Nobis.” (See Dkt. No. 4.) This Court has
25 concluded that it lacks jurisdiction to consider petitioner’s petition for writ of habeas corpus because
26 petitioner is not “in custody.” The Court notes that it also lacks jurisdiction to consider any petition
for writ of error coram nobis because such a writ is not available in federal court to attack the
judgment of a state court. See *Finkelstein v. Spitzer*, 455 F.3d 131, 133-34 (2nd Cir. 2006) (citing
cases). See also, *United States v. Tucor International, Inc.*, 35 F.Supp.2d 1172 (N.D. Cal. 1998).